Supreme Court, U.S.
FILED
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No. ____

In the Supreme Court of the United States

CHRISTOPHER TODD THOMAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether a police officer without an arrest or search warrant can go to the home of a suspect and call the suspect out of the house to arrest him and whether this is a constructive entry into the home resulting in an unconstitutional illegal entry and arrest, resulting in any evidence seized subject to the illegal arrest being illegally obtained as fruit of the poisonous tree.

Statement Pursuant to Supreme Court Rule 29.6

Petitioner is a Private Individual.

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Opinions Below

The ruling of the United States Court of Appeals for Sixth Circuit dated December 1, 2005, reversing the decision of the District Court is officially reported at 430 F3d 274 and is reproduced at App. B at 3a. The Order from the United States Court of Appeals for the Sixth Circuit denying the request for a rehearing en banc dated February 28, 2006. The decision of the United States District Court for the Western District of Tennessee granting the Defendant's motion to suppress evidence dated September 15, 2004 is reproduced at App. C at 15a.

Jurisdiction

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on February 28, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the United States Constitution in pertinent part, states that the right of the people to be secure in their persons houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause, . . .

The Defendant is charged with violations of 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846; and 21 U.S.C. § 924(c)(1)(2).

Statement of the Case

Defendant Christopher Todd Thomas was indicted by a federal grand jury in the Western District of Tennessee on March 15, 2004 and charged with attempting to manufacture methamphetamine (21 U.S.C. § 841(a)(1) and 846); possessing with intent to distribute methamphetamine (21 U.S.C. § 841(a)(1); possessing with intent to distribute over 500 grams of methamphetamine (21 U.S.C. § 841 (a) (1); and possessing a firearm during and in relation to a drug trafficking crime.

Thomas filed a motion to suppress evidence on June 10, 2004. The government filed its response on June 22, 2004. An evidentiary hearing was held on July 9, 2004, before United States District Judge James D. Todd. On September 15, 2004, the District Court issued a written order partially granting and partially denying the motion to suppress. The government timely filed its Notice of Appeal to the United States Sixth Circuit of Appeals on September 24, 2004 on the partial grant of the defendant's motion to suppress. It is from that ruling that the Defendant makes this request.

Summary of the Facts

On October 21, 2003, at approximately 3:00 a.m., Tim Higgins, manager of the Oakland Gin Company in Lauderdale County, Alabama, received a report from his employees that they had seen a suspicious vehicle close to a tank of anhydrous ammonia at the gin. Higgins went to the gin and saw a pickup truck behind a building next to the anhydrous ammonia tank. Higgins followed the truck to a café where he confronted the driver. The driver said that he was looking for something to eat and denied being behind the building. Higgins got the tag number of the truck and called it in to the

Lauderdale County Sheriff's Department. Higgins could not identify the driver.

Higgins returned to the gin and observed hoses from the fertilizer plant and small propane forklift lifts lying around the larger tank of anhydrous ammonia. No anhydrous ammonia had been taken.

While on patrol, Joe Hamilton, a deputy with the Lauderdale Sheriff's Department, received a report about the suspicious vehicle at the gin. He subsequently spotted a truck with a Tennessee license plate and the tag number that had been reported by Higgins and pulled the truck over. Deputy Hamilton identified the driver as Defendant Christopher Thomas. He observed a black plastic box and cloth bags similar to those carried by EMT's in the back of the truck. Defendant told Deputy Hamilton that he traveled selling medical supplies. Deputy Hamilton told Defendant that he had pulled him over because he had been observed around the gin. Defendant explained that he had been looking for a place to eat. Deputy Hamilton searched the Defendant's truck and allowed Defendant to leave. *Id.*

Deputy Hamilton returned to the gin where Higgins reported that someone had tried to steal anhydrous ammonia. Deputy Hamilton noticed that the fence around the tank had been cut, a wrench was lying on the ground, and a hose had been tapped into the tank. Deputy Hamilton relayed this information to Clifford Whitten, an investigator with the Lauderdale County Sheriff's Department. Investigator Whitten came to the gin at approximately 5:00 a.m., and Deputy Hamilton turned the investigation over to him. This anhydrous was a popular target and several arrests had been made in the months preceding this incident.

Investigator Whitten observed the hoses and tanks and determined that someone had been trying to steal anhydrous ammonia. Investigator Whitten took pictures of the scene and collected evidence including a piece of black cloth. Camouflage duct tape was on the tanks. Investigator Whitten then returned to the courthouse and met with Chief Investigator Travis Clemmons. Officers Whitten and Clemmons testified they came to Tennessee to arrest the Defendant. When the investigators arrived in Tennessee, they met Hardin County Sheriff's Department Officer Tim Cunningham near Ginger Hopper's residence. Officer Cunningham knew that the Defendant frequented Ms. Hopper's residence at 126 Garey Loop Road. Prior to the arrival of Investigators Whitten and Clemmons, Officer Cunningham drove past the residence and saw Defendant's truck parked behind the house. This occurred shortly after 8:00 a.m. The officers went to Ms. Hopper's residence around 10:00 a.m.

Without any warrant, Investigator Whitten walked to the truck, which was sitting behind the house in the grass, and saw that the door was open. He saw a Thompson .357 firearm in the truck's seat. He also saw two black plastic containers and a silver canister similar to canisters that contain Coca-Cola in the back of the truck. Investigator Whitten had been involved in investigating thefts of anhydrous ammonia and was aware that canisters such as the one he observed had been used in those thefts. The items in the truck were not visible from the road.

Investigator Clemmons and Officer Cunningham knocked on the rear door of the residence while other officers went to the front of the residence. They went to the rear door because Officer Cunningham thought that this was the entrance used by Ms. Hopper. Ms. Hopper answered the door. Officer

Cunningham spotted the Defendant inside the residence and said we want to talk to him. When Defendant came to the door, Officer Cunningham told Defendant that the Alabama investigators wanted to talk to him. The Defendant was asked to come outside the residence. There were four patrol cars at Ms. Hopper's residence. Two officers were at the rear door, an officer in the yard, and two officers were at the front door. Investigator Clemmons attempted to talk to Defendant. Defendant stated that he did not want to talk to him and asked for an attorney. The officers then formally arrested Defendant. According to the testimony of Officer Cunningham, Defendant was not free to leave from the moment that he exited the residence.

Subsequent to the arrest, the officers searched Defendant and found a quantity of methamphetamine on his person. A roll of camouflage duct tape and a black mask, two breathing apparatuses, a container of pill crush, another quantity of methamphetamine, marijuana, needles, funnels, three bottles of liquid drain opener, and a handwritten recipe for methamphetamine were among the items found in the truck after Defendant's arrest. A .25 Bronco firearm was found in the cab of the truck, in addition to the .357 Thompson firearm that Officer Whitten saw.

The Court ruled, however, that the warrantless arrest violated the Fourth Amendment under *Payton v. New York*, 445 U.S. 573 (1980), because the officers had "constructively" entered Hopper's residence to arrest Defendant.[1] The Court reasoned:

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[1] Based on the evidence at the suppression hearing, the district court found that Defendant had a legitimate expectation in Hopper's residence because he had been staying there as a guest.

> The Court finds that the officers in the present case made a constructive entry into Ms. Hopper's house when Officer Cunningham called Defendant to the door and asked him to step outside so that the Alabama investigators could talk to him. The presence of (1) two officers at the back door and two officers at the front door of the house, (2) Investigator Whitten in the yard close to defendant's truck, and (3) four patrol cars in the driveway would have led a reasonable person in Defendant's position to believe that he was not free to leave. Moreover, the officers considered Defendant to be under arrest as soon as he came to the door.

Id. at 15-16. The Court further found that "exigent circumstances" did not exist to excuse the officers' failure to obtain a warrant." *Id.* at 16-17. "Because the officers made an in-home warrantless arrest in the absence of any exigent circumstances to justify such an arrest," the Court ruled that "the arrest was not lawful and that any items seized from Defendant's person as a result of the arrest must be suppressed." *Id.* at 16.

The District Court went on to hold, even though the officers did not physically cross Ms. Hopper's threshold, the officers' actions constituted a "constructive entrance" of the house. The testimony at the hearing established that four patrol cars went to Ms. Hopper's house. The officers went to the house with the intent to arrest Defendant and the officers from Alabama had come to Tennessee for the express purpose of arresting the Defendant and Officers Cunningham, Whitten, and Clemons testified accordingly. Two officers went to the back door while two other officers went to the front door. The Defendant did not initially come to the door. Officer Cunningham told Defendant that "the Alabama

authorities" wanted to talk to him and asked Defendant to come outside. Defendant came outside and sat with Investigator Clemmons for approximately one minute before he asked for an attorney and was then formally arrested. According to Officer Cunningham, Defendant was under arrest from the moment that he exited the house even though he had not been formally placed under arrest and was not free to leave.

The court looked to *United States v. Mendenhall*, 446 U.S. 544 (1980), for the "standard for determining whether an arrest has occurred":

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Mendenhall, 446 U.S. at 554.

Reasons for Granting the Petition

It is respectfully contended that the United States Sixth Circuit Court's opinion is in error in certain factual determinations. Additionally, the opinion overlooks certain facts in law and mistakenly interprets and applies those and other facts to the law. Specifically Whether police officers

in requiring the Defendant to leave a residence, made his warrantless arrest outside the residence invalid under *Payton v. New York*, 445 U.S. 573 (1980); *U.S. v. Morgan*, 743 F.2d 1158 (6th Cir.1984); and *United States v. Saari*, 272 U.S. 804 (6th Cir. 2001). Respectfully, the United States Sixth Circuit Court of Appeals disregarded *U.S. v. Smith*, 263 F.3d 571, 581, (6th Cir. 2001), to view the evidence in the light most likely to support the District Court's decision. The panel decision conflicts with the authoritative decisions of other United States Court of Appeals that have addressed this issue specifically in *United States v. Karagozian*, 914 F.2d 239 (2d Cir.1990).

The Circuits are Split

In *United States v. Saari*, 272 F.3d 804(6th Cir. 2001), the Sixth Circuit Court of Appeals affirmed the trial court's holding that the Defendant's warrantless arrest was accomplished while he was in his home and without exigent circumstances, in violation of the Fourth Amendment. In that case, the defendant answered a knock at the door and found two officers with their guns drawn. *Id.* at 807. The officers instructed the defendant to come outside, which he did, and an arrest was made. *Id.*

The court concluded that the officers' conduct constituted a constructive entry and in-home arrest. In reaching this conclusion, the court looked to *United States v. Mendenhall*, 446 U.S. 544 (1980), for the "standard for determining whether an arrest has occurred":

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that

> he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Saari, 272 F.3d at 808 (quoting *Mendenhall*, 446 U.S. at 554).

Applying this standard to the facts, the *Saari* court found that:

> Here, the officers positioned themselves in front of the only exit from Defendant's apartment with their guns drawn. They knocked forcefully on the door and announced that they were the police. Upon opening the door, Defendant was instructed to come outside, which he did. Under these circumstances, a reasonable person would have believed that he was not free to leave. Tellingly, Officer Cleveland acknowledged that Defendant would not have been permitted to stay inside of his apartment.
>
> In response to the Government's argument that the officers did not violate *Payton* because they never crossed the threshold of the defendant's home, the *Morgan* court held that the relevant inquiry is the location of the person being arrested, not the arresting officer. *Id.* at 1166. "Although there was no direct police entry into the Morgan home prior to Morgan's arrest, the constructive entry accomplished the same thing, namely, the arrest of Morgan." *Id.*

The instant case is basically the same factually with the exception that the police officers did not have their guns drawn and there were more than 2 officers visible to the defendant at his door or in his yard.

The facts in *United States v. Karagozian*, 715 F. Supp. 1160 (D. Conn. 1989), *aff'd*, 914 F.2d 239 (2d Cir. 1990), are remarkably similar to those in this case. Officers went to Karagozian's house with the purpose of arresting him. *Id.* at 1162.

> The agents and police officers arrived at Karagozian's house at some time before 4:00 p.m., and they parked in Karagozian's driveway. Special Agent Bryfonski then walked up some stairs located at the side of the house, which led to a raised wooden deck behind the house. A sliding glass door at the rear of the house opened onto this deck. Karagozian came to the sliding glass door, and Special Agent Bryfonski identified himself. Special Agent Bryfonski asked Karagozian to come outside; Karagozian asked why and Special Agent Bryfonski told him he would rather talk to him outside. Karagozian then walked out onto the wooden deck. It is undisputed that, at least by the time Karagozian was on the deck and one or two steps away from the sliding glass door, he was under arrest. It is also undisputed that no force or deception was used to bring Karagozian from inside the sliding glass door to outside it.
>
> Karagozian and Special Agent Bryfonski went to the driveway and then into a police car. Meanwhile, Special Agent Aldridge entered Karagozian's house through the sliding glass door, with his gun drawn. Karagozian was informed of his rights and was told

> what the police had seen him do that day with Pepin. When Karagozian did not agree to cooperate and give a statement, he was asked to get out of the car, where he was told he was under arrest, handcuffed, returned to the police car, and again informed of his rights. .

Id. (footnote omitted).

The Government contended that *Payton's* warrant requirement did not apply because Karagozian was arrested outside his house. According to the Government, as long as the officers did not cross the threshold of the door, they met the requisites of *Payton*. *Id.* at 1164. The court rejected this position, finding that, although the officers had probable cause to arrest Karagozian, the Fourth Amendment required a warrant for such an arrest and no exigent circumstances justified not getting one.

> In the first place, the deck was not an area in which Karagozian had merely "the customary easement of way in the common hallway," but rather an area of which he was the fee simple owner and had the right to exclude others. But far more important than any property concepts, is the reasonable expectation of privacy that Karagozian had regarding his rear deck. While "there is substantial lower court authority for the proposition that *areas such as driveways that are readily accessible to visitors* are not entitled to the same degree of Fourth Amendment protection as are the interiors of defendants' houses," (emphasis added), the rear deck, being at the rear of the house, was not a place, like a driveway, with ready access to visitors. Furthermore, being in the rear of the house, it was not an area generally visible to members of the

> public. I conclude that the doctrine of *Payton* applies to an arrest made on the rear deck of the Karagozian home.

Id. at 1164 (citations omitted).[2]

The court noted that the "police can still question people in their homes. In the absence of exigent circumstances, what they cannot do without a warrant is arrest people in their homes, even if they have probable cause to arrest." *Id.* at 1165.

Although the district court found a slight difference in the raised deck between *Karagozian* and this case, the Defendant takes the position that the raised rear deck at the Defendant's residence also was not an area readily accessible to the public.

The striking similarity of the facts of this case with Karagozian is too close to be ignored.

The Sixth Circuit Court of Appeals Opinion Incorrectly Assumes Facts Not in the Record and Misapplies Prior Precedent.

The Defendant respectfully disagrees with certain findings of the 6th Circuit Panel.

Two officers knocked on the back door of Hopper's home

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[2] The fact that Officer Cunningham testified that he had observed that the rear door was the usual entrance to Ms. Hopper's house does not change the outcome of the present case. As in *Karagozian*, "being in the rear of the house, it was not an area generally visible to members of the public" and was not "readily accessible to visitors."

which served as the primary entrance to the home according to the local police. There were two officers at the front door but the panel of this Court failed to include the uncontroverted fact that there was another officer standing in the yard near the back door of Hopper's home, not in one of the patrol units. Additionally, there were four patrol cars parked not just at the home but in the driveway of the home. These four patrol units parked in the driveway are to the side of the rear entrance but are visible from the rear entrance. The District Court found that this was a significant factor in its finding that the Defendant had no choice except to exit the residence when told to do so by the authorities.

Additionally, the Sixth Circuit found that when Thomas came to the back door, the officers told him that the Alabama investigators wanted to talk to him and he then exited the residence. (Citing the District Court Order). Respectfully, this appears to be in error. Actually, what happened and what is reflected in the record was that when the police knocked on the door to the residence, the owner of the residence came to the door, Ms. Hopper. Only after the Defendant was spotted inside the residence was he ordered to come outside the residence. Again, this was significant factor in the District Court's finding that Defendant was required to leave the residence by the authorities.

The panel, in reviewing this case, referred to *U.S. v. Nash*, 2004 WL 2912796, where Nash opened his door willingly and when requested, stepped out on the porch. In the instant case, the Defendant did not open the door and only stepped out on the porch after being ordered to do so by the officer after being observed inside the residence.

Where in *Nash* there was no coercion or demands on the part of the police to exit the residence, in the instant case

there were, and this is the only reason that the Defendant exited the residence.

In the instant case, Defendant did not voluntarily leave the confines of the home, but did so after being required to do so by the officers that were present.

The Sixth Circuit Opinion also attempts to distinguish *U.S. v. Karagozian*, 715 F.Sup. 1160 by finding that the rear deck was adjacent to the driveway and served as the primary entrance to Hopper's home and therefore open to the police. Defendant respectfully differs with the panel in that, just because a rear deck on a home is close to the driveway and the occupants of the home use a rear entrance to come and go does not necessarily mean that a person living in that home has waived their expectation of privacy for the rear deck. The deck was not open to public view from the front, nor from the public roadway, and was in the rear of the home. There is no evidence in the record and none was introduced by the government to indicate that there was a waiver of a reasonable expectation of privacy in the rear deck.

Additionally, the Sixth Circuit Opinion analyzes that bringing several officers to investigate a potential methamphetamine lab would seem to be justified. There is, however, no evidence in the record that indicates that there was a methamphetamine lab at this location. Additionally, the location had been under surveillance for in excess of two hours by Officer Cunningham prior to the Alabama authorities arriving. Also, Defendant had been stopped in his vehicle in Alabama and had been searched at that time and truck had been looked into by Deputy Hamilton in Alabama at a location close to the anhydrous ammonia tanks.

Certainly we should not require officers to take unreasonable and unnecessary risks in the performance of

their duties; however, there is no evidence and none in the record reviewed by the Court to indicate that a methamphetamine lab was potentially at this location. Additionally, no anhydrous ammonia was found at the location during a search of the Defendant or his truck. The officers elected not to do a search of the home nor did they request a consent to search the home.

To allow the establishment of a rule that if a citizen who were to answer a knock at the door can then be arrested without a warrant, would set back public policy and then it would discourage private citizens from answering knocks on the door by uniformed officers and subject them to an arrest for nothing more than the common courtesy of answering the door. We as a society should be promoting the police officer's knock-and-talk strategy and encourage private citizens to answer the door and to discuss with police officers any questions that they might have. Moreover, police officers can ask to enter the home and conduct whatever knock-and-talk or questioning that they deem necessary at that time without asking the private citizen to exit his residence.

Conclusion

Your Defendant would respectfully submit to this Court that any reasonable person in the Defendant's position here would have believed he was not free to leave and would have submitted to the assertion of authority of the police officer present and would have exited the residence upon their demands.

Once again, respectfully, the police conduct constitutes a level of coercion which would be in violation of the Fourth Amendment as found by the District Court.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-6148

[Filed February 28, 2006]

UNITED STATES OF AMERICA,)
Plaintiff-Appellant,)
)
v.)
)
CHRISTOPHER TODD THOMAS,)
Defendant-Appellee.)
)

Before: SILER and SUTTON, Circuit Judges; SHARP, District Judge.*

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* The Honorable Allen Sharp, United States District Judge for the Northern District of Indiana, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and the decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-6148

[Filed December 1, 2005]

UNITED STATES OF AMERICA,)
Plaintiff-Appellant,)
)
v.)
)
CHRISTOPHER TODD THOMAS,)
Defendant-Appellee.)

Appeal from the United States District Court
for the Western District of Tennessee at Jackson
No. 04-10031-James D. Todd, Chief District Judge

Before: SILER and SUTTON, Circuit Judges; SHARP, District Judge.*

* The Honorable Allen Sharp, United States District Judge for the Northern District of Indiana, sitting by designation.

OPINION

SUTTON, Circuit Judge. The United States challenges a suppression-of-evidence ruling, arguing that the district court erred in concluding that police officers constructively entered a home without a warrant and without being able to satisfy any of the narrow exceptions to the warrant requirement. Because the police officers did not enter the house and because the defendant, Christopher Thomas, did not exit the house as a result of physical force or any other conspicuous show of authority by the police, *cf. United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984) and *United States v. Saari*, 272 F.3d 804 (6th Cir. 2001), we reverse.

I.

Early in the morning of October 21, 2003, Tim Higgins, the manager of the Oakland Gin Company in Lauderdale County, Alabama, noticed a pickup truck near the company's tank of anhydrous ammonia. His suspicion aroused, he followed the truck to a restaurant and confronted the driver, Christopher Thomas, who denied being near the tank. Higgins recorded the license number of the truck and reported the incident to local police.

Soon after receiving the report, Deputy Joe Hamilton spotted Thomas driving his truck and stopped him. When asked what he had been doing at the gin company, Thomas explained that he had been looking for a place to eat. Hamilton let him go but then proceeded to the gin company, where he observed that the fence around the tank had been cut, a wrench had been left on the ground and a hose had been tapped into the tank. Based on these observations, the police suspected Thomas of attempting to steal anhydrous

ammonia, a chemical used in the production of methamphetamine.

At roughly 10:00 a.m. that morning, several Alabama-based and Tennessee-based police officers drove to the Tennessee home of Ginger Hopper, where Thomas had been living and which is near Lauderdale County, Alabama. There, they found Thomas's truck parked behind the house; one of the doors to the truck was open, and a Thompson .357 handgun lay on the front seat. The officers also noticed a silver canister in the back of the truck, similar to canisters that one of the officers recognized as having been used in other thefts of anhydrous ammonia.

Two officers knocked on the back door of Hopper's home, which served as the primary entrance to the home according to local police. Two officers went to the front door. Four patrol cars in total were parked at the house, and apparently one of the cars contained a fifth officer. When Thomas came to the back door, the officers "told [him] that the Alabama investigators wanted to talk to him and asked him to come out of the residence, which he did." D. Ct. Order at 5; *see also* Thomas Br. at 6 ("The Defendant was asked to come outside the residence."). After Thomas exited the house, he refused to talk and requested an attorney. At this point, the officers arrested him.

After the arrest, the police searched Thomas and discovered incriminating evidence, including methamphetamine and a handwritten recipe for making more. They also searched the truck and discovered two firearms as well as the scent of anhydrous ammonia.

The district court suppressed the evidence, holding that the arrest violated the Fourth Amendment. Under *Payton v.*

New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the court noted, police may not enter a home to make an arrest without a warrant in the absence of exigent circumstances. *Id.* at 590. And under *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), the court added, a "constructive entry" into a home in violation of *Payton* occurs whenever the police use "coercive [] conduct" to force a defendant outside of the home. *Id.* at 1166. Concluding that the police conduct in this instance was coercive, the district court held that a constructive entry into Hopper's home had taken place, that the police neither possessed a warrant nor established exigent circumstances for the entry and that the arrest accordingly was unlawful.

II.

"The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. The question here is when we will deem officers to have crossed that "threshold" in law when they have not done so in fact. As there are no material disputes about what happened during the encounter in this case, the district court's determination that a constructive entry occurred receives de novo review. *See United States v. Buchanon*, 72 F.3d 1217, 1222-23 (6th Cir. 1995); *see also United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

On one side of the ledger, the law has long permitted officers to engage in consensual encounters with suspects without violating the Fourth Amendment. *See, e.g., Bennett v. City of Eastpointe*, 410 F.3d 810, 821 (6th Cir. 2005) ("A purely consensual encounter between a police officer and a citizen does not implicate the Fourth Amendment."); *United*

States v. Hudson, 405 F.3d 425, 439 n.10 (6th Cir. 2005) ("The police were of course free to approach Hudson and talk with him so long as they did not do so in a manner that would lead a reasonable person to feel that he was not free to leave."); *United States v. Waldon*, 206 F.3d 597, 602 (6th Cir. 2000) ("The consensual encounter may be initiated without any objective level of suspicion.").

Consensual encounters do not lose their propriety, moreover, merely because they take place at the entrance of a citizen's home. A number of courts, including this one, have recognized "knock and talk" consensual encounters as a legitimate investigative technique at the home of a suspect or an individual with information about an investigation. *See, e.g.*, *United States v. Chambers*, 395 F.3d 563, 568 n.2 (6th Cir. 2005) ("Courts generally have upheld [the knock and talk] investigative procedure as a legitimate effort to obtain a suspect's consent to search."); *Ewolski v. City of Brunswick*, 287 F.3d 492, 504-05 (6th Cir. 2002) (concluding that it was reasonable to approach a suspect's home to attempt to learn more through consensual questioning); *Nash v. United States*, 117 Fed. Appx. 992, 2004 WL 2912796, at *1 (6th Cir. 2004) (noting that this court has "explicitly upheld the legitimacy of doorstep investigatory interviews"); *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001) ("Federal courts have recognized the 'knock and talk' strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity."); *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000) (holding that "no suspicion needed to be shown in order to justify the 'knock and talk'"); *United States v. Jerez*, 108 F.3d 684, 691-92 (7th Cir. 1997) (recognizing that a knock and talk is ordinarily consensual unless coercive circumstances exist); *United States v. Titemore*, 335 F. Supp. 2d 502, 505 (D. Vt. 2004) ("Under

the rule permitting knock and talk visits, no Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors.") (quotation omitted).

On the other side of the ledger, we have held that a consensual encounter at the doorstep may evolve into a "constructive entry" when the police, while not entering the house, deploy overbearing tactics that essentially force the individual out of the home. In *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), we held that a "constructive entry" occurred when a suspect emerged from a house "in response to coercive police conduct." *Id.* at 1166. And in *United States v. Saari*, 272 F.3d 804 (6th Cir. 2001), we described coercive police conduct as "such a show of authority that [the] Defendant reasonably believed he had no choice but to comply." *Id.* at 809.

The difference between the two-between a permissible consensual encounter and an impermissible constructive entry-turns on the show of force exhibited by the police. In *Nash*, for example, we described a typical consensual encounter: "No testimony . . . indicated drawn weapons, raised voices, or coercive demands on the part of the police . . . . Rather, Nash opened the door willingly, and when requested, stepped out onto the porch." 117 Fed. Appx. 992, 2004 WL 2912796, at *1. *Morgan*, by contrast, involved a team of ten officers who surrounded the house, blocked the suspect's car, "flooded the house with spotlights and summoned Morgan from his mother's home with the blaring call of a bullhorn." 743 F.2d at 1161. And *Saari* involved four officers who "knocked forcefully on the door and announced that they were the police." 272 F.3d at 808. One officer "had a 12-gauge, pump-action shotgun drawn and in a 'low ready' position, that is, pointed at approximately forty-five degrees

toward the ground in front of the door." *Id.* at 806. The others had their service weapons drawn, and, "upon opening the door, Defendant was instructed to come outside, which he did." *Id.* at 808; *see also Sharrar v. Felsing*, 128 F.3d 810, 819 (3d Cir. 1997) (holding that "no reasonable person would have believed that he was free to remain in the house" when the police surrounded the house, pointed machine guns at the windows and ordered the occupants out); *United States v. Maez*, 872 F.2d 1444, 1450 (10th Cir. 1989) (holding that when a SWAT team surrounded a trailer with rifles pointed at the home and addressed the occupants over loudspeakers "a reasonable person would have believed he had to come out of the home"); *United States v. Edmondson*, 791 F.2d 1512, 1514 (11th Cir. 1986) (holding that a suspect's consent to entry was coerced when FBI officers surrounded the front of the defendant's apartment, with weapons drawn, and yelled, "FBI. Open the door."); *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985) (holding that an arrest occurred when "the police had completely surrounded appellee's trailer with their weapons drawn and ordered him through a bullhorn to leave the trailer and drop to his knees"); *see also United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980) (holding that *Payton* prohibits "subterfuge in getting the suspect to open the door" because such an exposure is "nonconsensual").

Measured by these decisions, the officers' conduct in this case did not rise to the level of a constructive entry. Two officers "knocked on the rear door . . . . When Defendant came to the door, Officer Cunningham told Defendant that the Alabama investigators wanted to talk to him and asked him to come out of the residence, which he did." D. Ct. Order at 5. As in *Nash*, "no testimony . . . indicated drawn weapons, raised voices, or coercive demands on the part of the police." 117 Fed. Appx. 992, 2004 WL 2912796, at *1. Thomas

responded to a simple knock and request, not an order to emerge or the threat of firearms. And he has given us no basis for concluding that a reasonable person, confronted with a knock on the door by police officers, would believe without more that he was either under arrest or otherwise compelled to leave the house. On this record, no "constructive entry" occurred.

This determination not only respects the line between consensual and coercive encounters drawn by our precedents but also respects the line drawn in this area by other circuit courts. In *United States v. Vaneaton*, 49 F.3d 1423 (9th Cir. 1995), for example, the suspect voluntarily exposed himself to the police by opening his hotel door in response to a knock on the door by police. The court noted that "no threats or force were used by the police to get him to open the door, and his actions were not taken in response to a claim of lawful authority." *Id.* at 1427. Thus, the court held, the exposure to police was voluntary, the subsequent arrest lawful. *Id.*; *see also Saari*, 272 F.3d at 809 n.4 (noting, in distinguishing *Vaneaton*, that "the uniformed officers had their guns in their holsters and said nothing upon knocking . . . . The defendant opened the window curtains, saw the officers and opened the door. There was no testimony in *Vaneaton* indicating that the defendant was faced with a show of force making it clear that he had no choice but to present himself for arrest"). *See also Cormier*, 220 F.3d at 1109 (holding that no Fourth Amendment violation occurred when an officer "knocked on the door for only a short period spanning seconds" and "never announced that she was a police officer while knocking nor did she ever compel Cormier to open the door under the badge of authority. Because there was no police demand to open the door . . . there is no evidence to indicate that the encounter was anything other than consensual") (citations omitted); *Duncan v. Storie*, 869 F.2d 1100, 1102

(8th Cir. 1989) (suggesting that no Fourth Amendment violation would occur when "an individual voluntarily left the confines of his home . . . [and] the arrest was made in a public place"); *United States v. Mason*, 661 F.2d 45, 47 (5th Cir. 1981) (holding that no Fourth Amendment violation occurred when defendant came to doorway as agents approached the house and was then placed under arrest); *United States v. Botero*, 589 F.2d 430, 432 (9th Cir. 1978) (holding that no Fourth Amendment violation occurred when "in response to (the agent's) knock, the door was opened by defendant Botero [and he] was placed under arrest at that time"); *Fredericks v. Wright*, 1995 U.S. App. LEXIS 1231, No. 94-35494, 1995 WL 23651, at *2 (9th Cir. Jan. 20, 1995) (holding that no Fourth Amendment violation occurred when "government officers [] knocked on an individual's door and [] arrested the individual when the door [was] opened, even if the individual [was] still standing in the doorway"); *United States v. Von Marschner*, No. 86-5334, 1988 WL 65553, at *2 (9th Cir. June 16, 1988) (holding that no Fourth Amendment violation occurred when seven agents "knocked on Von Marschner's door, identified themselves, and invited Von Marschner to step outside"); *see also* 3 Wayne LaFave, Search and Seizure § 6.1(e) (4th ed. 2004) ("It has been deemed unobjectionable that the defendant came outside at the request of police who did not reveal their intention to arrest . . . . However, the warrantless arrest will be illegal if the defendant's presence outside was acquired by coercion.").

To the extent other circuits have drawn a line different from the one we have drawn, it is a line that is *less* protective of individual liberties and one that turns solely on whether the officers in fact crossed the physical threshold of the entrance to the home. *See Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002) (" *Payton* keeps the officer's body outside the threshold, not his voice. It does not prevent a law

enforcement officer from telling a suspect to step outside his home and then arresting him without a warrant."); *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991) (*Payton* prohibits only a warrantless entry into the home, "not a policeman's use of his voice to convey a message of arrest from outside the home"); *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987) (holding that *Payton* was not violated when police, without crossing the threshold, pointed guns at and arrested the defendant when he was still within the hotel room).

Thomas offers three arguments in attempting to counter the conclusion that the officers did not violate his Fourth Amendment rights. He first claims that the opinion by Judge Cabranes in *United States v. Karagozian,* 715 F. Supp. 1160 (D. Conn. 1989), leads to a different outcome. True, that case, like this one, involved a visit by police to the rear deck of a house and, true, the court held that the police violated the Fourth Amendment in the course of the encounter. But in today's case the rear deck was adjacent to the driveway and served as the primary entrance to Hopper's home. There, by contrast, the rear deck "was not a place, such as a driveway, with ready access to visitors." *Id.* at 1164. In *Karagozian*, the police thus violated the Fourth Amendment *before* they knocked on the suspect's door by breaching "the reasonable expectation of privacy that Karagozian had regarding his rear deck." *Id* . On that basis, the court concluded that "the doctrine of *Payton* applies to an arrest made on the rear deck of the Karagozian home." *Id.* Here, however, Thomas does not argue that he had a reasonable expectation [**16] of privacy in the back of Hopper's house-an argument that at all events could not be squared with the district court's finding that the back door "was customarily used as the entrance to the house." D. Ct. Order at 12.

Thomas next contends that the testimony of the officers, who "considered Defendant to be under arrest as soon as he came to the door," D. Ct. Order at 16, establishes that the encounter was coercive. But by now it is well established that the state of mind of arresting police officers does not establish whether a seizure in general or a constructive entry in particular has occurred. *See Mendenhall*, 446 U.S. at 554 n.6 ("The subjective intention [of law enforcement] to detain . . . is irrelevant except insofar as that may have been conveyed to the respondent."); *United States v. Waldon*, 206 F.3d 597, 603 (6th Cir. 2000) ("Whether an encounter between a police officer and a citizen is consensual depends on the officer's objective behavior, not on any subjective suspicion of criminal activity."); *see generally Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Thomas lastly argues that the number of officers involved in his ultimate arrest-five-establishes that the encounter was coercive. But the number of officers involved in this investigation was neither inherently coercive nor unjustified. Keep in mind that two different jurisdictions had an interest in the investigation-officers from Alabama (where the suspected crime had occurred) and officers from Tennessee (where the suspect was staying). Sending two officers to the primary entrance in the rear of the house was hardly unreasonable in the course of a drug-manufacturing investigation, and having other officers on hand in the event a conflict arose made abundant sense as well. Why four police vehicles were needed for five officers (particularly given today's gas prices) was never explained. But Thomas has never argued that he saw all of these vehicles before leaving the house or that the number of vehicles at the house somehow converted the incident into a coercive encounter. In

the final analysis, officers may take reasonable security precautions in doing their jobs, and bringing several officers to investigate a potential methamphetamine lab would seem to be doing just that. *See Terry v. Ohio*, 392 U.S. 1, 23, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ("Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."); *United States v. Layne*, 324 F.3d 464, 470 (6th Cir. 2003) (noting that a methamphetamine lab is an inherently dangerous place); *United States v. Bohannon,* 225 F.3d 615, 617 (6th Cir. 2000) ("The possible danger presented by an individual approaching and entering a structure housing a drug operation is obvious.") (quotation omitted).

III.

For these reasons, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

No. 04-10031

[Filed September 16, 2004]

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
)
CHRISTOPHER TODD THOMAS,)
Defendant.)
)

James D. Todd, District Judge

ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Defendant Christopher Todd Thomas has moved to suppress certain evidence which he contends was obtained illegally from his person, his vehicle, and his real property following his arrest. A hearing on Defendant's motion was held on July 9, 2004. The court has considered the testimony presented at the hearing, briefs submitted by the parties, the arguments made by counsel, and the record as a whole. Based

on the facts and the applicable law, the court makes the following ruling.

On October 21, 2003, the Hardin County Sheriff's Department arrested Defendant at the home of Ginger Hopper at 127 Garey Loop Road, Savannah, Tennessee. The arrest was made without a warrant. After the arrest, officers searched Defendant and his vehicle, which was parked in Hopper's driveway. Later that day, officers conducted a search of a three-sided barn located on property owned by Defendant and his wife. During the searches, officers seized several items, including two guns, methamphetamine, lithium batteries, drain opener, measuring devices, stir sticks, a cooler, digital scales, walkie talkies, a needle, a half gallon of ether, a stainless steel container, a coffee filter, breathing apparatuses, and a container of pill crush.

On March 15, 2004, Defendant was indicted on one count of unlawfully, knowingly, and intentionally attempting to manufacture methamphetamine in violation of 21 U.S.C. §§ 841 (a) (1) and 846, one count of unlawfully, knowingly, and intentionally possessing with the intent to distribute a substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. § 841(a)(1), one count of unlawfully, knowingly, and intentionally possessing with the intent to distribute over 500 grams of a substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. § 841(a)(1), one count of unlawfully, knowingly, and intentionally manufacturing over 500 grams of a substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. § 841 (a)(1), and one count of possessing a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(2).

Defendant contends that the officers lacked probable cause to arrest him, and, thus, the items recovered from his person and from his vehicle must be suppressed as the products of an illegal arrest. Defendant also asserts that, even if the officers had probable cause for the arrest, they should not have arrested him without first obtaining a warrant. Finally, Defendant argues that the officers' warrantless search of the three-sided barn was without probable cause and that his wife's consent to search the three-sided barn was coerced.

The testimony at the hearing on Defendant's motion to suppress established the events leading to Defendant's arrest and the search of his person, vehicle, and barn as follows. On October 21, 2003, at approximately 3:00 a.m., Tim Higgins, manager of the Oakland Gin Company in Lauderdale County, Alabama, received a report from his employees that they had seen a suspicious vehicle close to a tank of anhydrous ammonia at the gin.[1] Higgins went to the gin and saw a pick-up truck behind a building next to the anhydrous ammonia tank. Higgins followed the truck to a café where he confronted the driver. The driver said that he was looking for something to eat and denied being behind the building. Higgins got the tag number of the truck and called it in to the Lauderdale County Sheriff's Department. Higgins could not identify the driver.

Higgins returned to the gin and observed hoses from the fertilizer plant and small propane forklift lifts lying around the larger tank of anhydrous ammonia. It appeared to Higgins that someone had been trying to steal the anhydrous ammonia; however, none had been taken.

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[1] Anhydrous ammonia is used to manufacture methamphetamine.

While on patrol, Joe Hamilton, a deputy with the Lauderdale County Sheriff's Department, received a report about a suspicious vehicle at the gin. He subsequently spotted a truck with a Tennessee license plate and the tag number that had been reported by Higgins and pulled the truck over. Deputy Hamilton identified the driver as Defendant Christopher Thomas. He observed a black plastic box and cloth bags similar to those carried by EMTs in the back of the truck. Defendant told Deputy Hamilton that he traveled selling medical supplies.

Deputy Hamilton told Defendant that he had pulled him over because he had been observed around the gin. Defendant explained that he had been looking for a place to eat. Deputy Hamilton allowed Defendant to leave.

Deputy Hamilton returned to the gin where Higgins reported that someone had tried to steal anhydrous ammonia. Deputy Hamilton noticed that the fence around the tank had been cut, a wrench was lying on the ground, and a hose had been tapped into the tank. Deputy Hamilton relayed this information to Clifford Whitten, an investigator with the Lauderdale County Sheriff's Department. Investigator Whitten came to the gin at approximately 5:00 a.m., and Deputy Hamilton turned the investigation over to him.

Investigator Whitten observed the hoses and tanks and determined that someone had been trying to steal anhydrous ammonia, which is a felony in Alabama.[2] Investigator Whitten took pictures of the scene and collected evidence including a piece of black cloth. Camouflage duct tape was on the tanks.

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[2] Defendant stipulated that stealing anhydrous ammonia and attempting to steal anhydrous ammonia are felonies in Alabama.

Investigator Whitten then returned to the courthouse and met with Chief Investigator Travis Clemmons. Whitten and Clemmons decided to travel to Tennessee to investigate Defendant's presence at the gin.

When the investigators arrived in Tennessee, they met Hardin County Sheriff's Department Officer Tim Cunningham near Ginger Hopper's residence. Officer Cunningham knew that Defendant frequented Ms. Hopper's residence at 126 Garey Loop Road. Prior to the arrival of Investigators Whitten and Clemmons, Officer Cunningham drove past the residence and saw Defendant's truck parked behind the house. The officers went to Ms. Hopper's residence, around 10:00 a.m.

Investigator Whitten walked to the truck, which was sitting behind the house in the grass, and saw that the door was open. He saw a Thompson .367 firearm in the truck's seat. He also saw two black plastic containers and a silver canister similar to canisters that contain Coca-Cola in the back of the truck. Investigator Whitten had been involved in investigating thefts of anhydrous ammonia and was aware that canisters such as the one he observed had been used in those thefts. The items in the truck were not visible from the road.

Investigator Clemmons and Officer Cunningham knocked on the rear door of the residence while other officers went to the front of the residence. They went to the rear door because Officer Cunningham thought that this was the entrance used by Ms. Hopper. When Defendant came to the door, Officer Cunningham told Defendant that the Alabama investigators wanted to talk to him and asked him to come out of the residence, which he did. There were four patrol cars at Ms. Hopper's residence.

Investigator Clemmons attempted to talk to Defendant. Defendant stated that he did not want to talk to him and asked for an attorney. The officers then arrested Defendant. According to the testimony of Officer Cunningham, Defendant was not free to leave from the moment that he exited the residence.

Subsequent to the arrest, the officers searched Defendant and found a quantity of methamphetamine on his person. A roll of camouflage duct tape and a black mask, two breathing apparatuses, a container of pill crush, another quantity of methamphetamine, marijuana, needles, funnels, three bottles of liquid drain opener, and a handwritten recipe for methamphetamine were among the items found in the truck after Defendant' s arrest. A .25 Bronco firearm was found in the cab of the truck, in addition to the .357 Thompson firearm that Officer Whitten saw. The truck smelled of ether and anhydrous ammonia.

Around 5:00 p.m., Officer Cunningham was told by the Hardin County Sheriff to go to a location on Cobblestone Road. Officer Cunningham's instructions were based on an anonymous tip received by the Sheriff's Department that children in the neighborhood were in danger from activities being conducted in a "pig barn" located on that property.

The Cobblestone Road location proved to be an overgrown field of approximately ten acres with a fence around it and a three-sided barn with one side open to public view in the middle of the field. There was a metal gate across the open side of the building. The smell of chemicals used to

produce methamphetamine was present.[3] A working methamphetamine lab was visible in the three-sided barn.

The inside of the three-sided barn could not be seen from the public road. The officers reached the barn by going down a private drive.[4]

The officers determined that the building was owned by Defendant's wife, Beth Crunk Thomas.[5] The officers did not enter the three-sided barn until Mrs. Thomas arrived and gave her consent for the officers to enter the building. Mrs. Thomas signed a consent form for the officers to search the building. Although the officers advised Mrs. Thomas that she should sign the consent form so that she could stay out of trouble, no threats were made to her and she was treated "pretty nice" by the officers. At the suppression hearing, Mrs. Thomas acknowledged that she signed the form "knowingly and voluntarily." The officers did not obtain a warrant to search the building but, instead, based their authority to search on Mrs. Thomas' consent.

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[3] Defendant's wife and mother-in-law both testified that they were not aware of a chemical smell. However, the court finds the testimony of the officers concerning the presence of the chemical smell to be more credible.

[4] The officers testified that they did not see a gate across the private drive, while Defendant's witnesses testified that the gate was usually closed across the drive. In light of the fact that Defendant offered no testimony that the gate was, in fact, closed at the time that the officers entered the drive, the court finds that the gate was open.

[5] The officers later determined that the deed to the property was in the names of both Defendant and his wife.

Inside the building, the officers found items including a large green box containing plastic bowls, empty plastic containers, rubber gloves, funnels, six cans of propane fuel, a blender, a funnel with a garden hose attached, three stripped lithium batteries, mail addressed to Defendant with instructions on how to grow marijuana, a photograph of Defendant and his brother, containers holding various chemicals, and a container with a substance that tested positive for methamphetamine.

No anhydrous ammonia was found during any of the searches.

Items Seized from Defendant's Person

Defendant contends that the items seized from his person should be suppressed because (1) the officers did not have probable cause to arrest him and (2) even if the officers had probable cause they should have first obtained an arrest warrant.

In United States v. Watson, 423 U.S. 411 (1976), the Supreme Court re-stated the general rule that "'a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony.'" Id. at 417 (quoting Carrol v. United States, 267 U.S. 132, 156 (1925)). Thus, a "midday public arrest" without a warrant does not violate the Fourth Amendment if there is probable cause to believe that the suspect has committed a felony. Id. at 417, 418 n.6, 424. Probable cause to make an arrest exists if the facts and circumstances within the arresting officer's knowledge "were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964).

In the present case, the court finds that the officers did, in fact, have probable cause to arrest Defendant. A truck, later identified as Defendant's truck, was seen at the gin beside the anhydrous ammonia tank in the early morning hours. Defendant left when Tim Higgins approached the truck. Higgins followed him to a café, where Defendant stated that he was looking for something to eat. Higgins returned to the gin and discovered that someone had been trying to steal the anhydrous ammonia. An investigator also determined that someone had tried to steal the anhydrous ammonia. Attempting to steal anhydrous ammonia is a felony in Alabama. These facts would allow a reasonable person in the officer's position to believe that Defendant was attempting to steal anhydrous ammonia.

Next, the court must determine if Defendant's arrest without a warrant was unlawful despite the presence of probable cause. The Watson decision left open the question of whether the general rule concerning warrantless arrests extends to arrests made inside a person's home. 423 U.S. at 418 n.6. In Payton v. New York, 445 U.S. 573 (1980), the Court addressed this issue and held that, absent exigent circumstances, the police may not cross the "threshold" of a person's home to conduct a warrantless arrest. Payton, 445 U.S. at 590. The Court explained its holding by noting that "'[the] physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Id. at 585 (quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1972)). United States v. Morgan, 743 F.2d 1158, 1166-67 (6th Cir. 1984), went a step farther and held that, if a suspect is summoned out of his house as the result of coercive police activity occurring outside, the police activity is treated as a "constructive entry" and the officers must first obtain an arrest warrant, Id.; see also, e.g., United States v. Saari, 272 U.S. 804, 807-08 (6th Cir. 2001) (finding

a constructive entry under Morgan when the officers drew their guns, knocked on the door, announced their presence, and ordered the, defendant outside).

The Payton rule does not extend to a person who is merely present in the house with the consent of the owner, Minnesota v. Carter, 525 U.S. 83, 90 (1998). Therefore, to rely on Payton and Morgan, Defendant must demonstrate that he had a Fourth Amendment privacy interest in Ginger Hopper's house.[6] See Minnesota v. Olson, 495 U.S. 91, 95 (1990) ("The purpose of [Payton] was not to protect the person of the suspect but to protect his home from entry in the absence of a magistrate's finding of probable cause."); Steagald v. United States, 451 U.S. 204, 219 (1980)("[R]ights such as those conferred by the Fourth Amendment are personal in nature, and cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched [or, in this case, the place that was constructively entered]."") (citing United States v. Salvucci, 448 U.S. 83 (1980)).

That is, Defendant must show that he manifested a subjective expectation of privacy in Ms. Hopper's home and that society would recognize his subjective expectation as an objectively reasonable one, rather than showing that he actually had an ownership interest in the house. Olson, 495 U.S. at 95-97. Defendant has the burden of making this preliminary showing. Rakas v. Illinois, 439 U.S. 128, 132

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[6] Courts have rejected the "rubric of standing" as to violations of the Fourth Amendment and, instead, look to whether the defendant had an expectation of privacy in the place searched. Minnesota v. Carter, 525 U.S. 82, 87 (1998) (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)).

(1978) (citing Simmons v. United States, 390 U.S. 377, 389-90 (1960)); United States v. Smith, 263 F.3d 571, 582 (6th Cir. 2001); United States v. Sangiento-Miranda, 859 F.2d 1501, 1510 (6th Cir. 1988).

In the present case, Officer Cunningham testified that he was aware that Defendant had been "staying" with Ginger Hopper at her residence. He knew to look for Defendant's truck at Ms. Hopper's residence because Defendant was a frequent visitor there. Defendant and his wife have submitted affidavits in which they state that Defendant was living with Ms. Hopper.

A temporary resident or even an occasional overnight guest may have a reasonable expectation of privacy. See Olson, 495 U.S. 96-97 ("We need go no further than to conclude, as we do, that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable")[7] See also United States v. Bell, 2002 WL

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[7] The Olson Court explained that:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a house guest has a legitimate expectation

1483874 (W.D. Tenn.) (Finding a reasonable expectation of privacy based on testimony that the defendant stayed overnight at the house three to four nights a week, had a key to the house, kept some of his clothes there, and took care of the homeowner's two sons when she was away). C.f. United States v. McNeal, 955 F.2d 1067 (6th Cir.), *cert. denied,* 505 U.S. 1223(1992) No legitimate expectation of privacy existed when the defendant possessed a key to the apartment searched as well as other apartments in the complex in which he did not reside, had no personal effects in the premises, and stated to police that he did not stay there and had merely stopped to use the telephone.)

Because Defendant had been "staying" at Ms. Hopper's house as a guest and was not merely in the home temporarily, the court finds that he had a reasonable expectation of privacy in that house.

Even though the officers did not cross Ms. Hopper's threshold, the court must consider whether the officers' actions constituted a "constructive entrance" of the house. The testimony at the hearing established that four patrol cars went to Ms. Hopper's house. The officers went to the house with the intent to arrest Defendant. Two officers went to the back door which was customarily used as the entrance to the house while two other officers went to the front door. Officer Cunningham told Defendant that "the Alabama authorities" wanted to talk to him asked Defendant to come outside. Defendant came outside and sat with Investigator Clemmons for approximately one minute before he was arrested.

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of privacy in his host's home.

495 U.S. at 98.

According to Officer Cunningham Defendant was under arrest from the moment that he exited the house even though he had not been formally placed under arrest and was not free to leave.

In United States v. Saari, 272 F.3d 804 (6th Cir. 2001), the Sixth Circuit Court of Appeals affirmed the trial court's holding that the defendant's warrantless arrest was accomplished while he was in his home and without exigent circumstances, in violation of the Fourth Amendment. In that case, the defendant answered a knock at door and found two officers with their guns drawn. Id. at 807. The officers instructed the defendant to come outside, which he did, and an arrest made. Id.

The court concluded that the officers' conduct constituted a constructive entry and in-home arrest. In reaching this conclusion, the court looked to United States v. Mendenhall, 446 U.S. 544 (1980), for the "standard for determining whether an arrest has occurred":

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Saari, 272 F.3d at 808 (quoting Mendenhall, 446 U.S. at 554).

> Applying this standard to the facts, the Sarri court found that:
>
> Here, the officers positioned themselves in front of the only exit from Defendant's apartment with their guns drawn. They knocked forcefully on the door and announced that they were the police. Upon opening the door, Defendant was instructed to come outside, which he did. Under these circumstances, a reasonable person would have believed that he was not free to leave. Tellingly, Officer Cleveland acknowledged that Defendant would not have been permitted to stay inside of his apartment.
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> In response to the Government's argument that the officers did not violate Payton, because they never crossed the threshold of the defendant's home, the Morgan court held that the relevant inquiry is the location of the person being arrested, not the arresting officer. Id. at 1166. "Although there was no direct police entry into the Morgan home prior to Morgan's arrest, the constructive entry accomplished the same thing, namely, the arrest of Morgan." Id.
>
> As in Morgan, the officers here summoned Defendant to exit his home and acted with such a show of authority that Defendant reasonably believed he had no choice but to comply. His warrantless arrest was accomplished while he was in his home, in violation of the Fourth Amendment.

272 F.3d at 808-09.

The facts in United States v. Karagozian, 715 F. Supp. 1160 (D. Conn. 1989), *aff'd,* 914 F.2d 239 (2nd Cir. 1990), are remarkably similar to those in this case. Officers went to Karagozian's house with the purpose of arresting him. Id. at 1162.

> The agents and police officers arrived at Karagozian's house at some time before 4:00 p.m., and they parked in Karagozian's driveway. Special Agent Bryfonski then walked up some stairs located at the side of the house, which led to a raised wooden deck behind the house. A sliding glass door at the rear of the house opened onto this deck. Karagozian came to the sliding glass door. and Special Agent Bryfonski identified himself. Special Agent Bryfonski asked Karagozian to come outside; Karagozian asked why and Special Agent Bryfonski told him he would rather talk to him outside. Karagozian then walked out onto the wooden deck. It is undisputed that, at least by the time Karagozian was on the deck and one or two steps away from the sliding glass door, he was under arrest. It is also undisputed that no force or deception was used to bring Karagozian from inside the sliding glass door to outside it.
>
> Karagozian and Special Agent Bryfonski went to the driveway and then into a police car. Meanwhile, Special Agent Aldridge entered Karagozian's house through the sliding glass door, with his gun drawn. Karagozian was informed of his rights and was told what the police had seen him do that day with Pepin. When Karagozian did not agree to cooperate and give a statement, he was asked to get out of the car, where he was told he was under arrest, handcuffed, returned to the police car, and again informed of his rights.

Id. (footnote omitted). The only real difference between Karagozian and this case is that in Karagozian there was "no evidence suggesting that this raised deck, being in the rear of the house, was a natural place for a visitor to go or was in any way an area readily accessible to visitors." Id. at 1162 n. 4.

The Government contended that Payton's warrant requirement did not apply because Karagozian was arrested outside his house. According to the Government, as long as the officers did not cross the threshold of the door, they met the requisites of Payton. Id. at 1164. The court rejected this position, finding that, although the officers had probable cause to arrest Karagozian, the Fourth Amendment required a warrant for such an arrest and no exigent circumstances justified not getting one. Id.

> In the first place, the deck was not an area in which Karagozian had merely "the customary easement of way in the common hallway," but rather an area of which he was the fee simple owner and had the right to exclude others. But far more important than any property concepts, is the reasonable expectation of privacy that Karagozian had regarding his rear deck. While "there is substantial lower court authority for the proposition that *areas such as driveways that are readily accessible to visitors* are not entitled to the same degree of Fourth Amendment protection as are the interiors of defendants' houses," (emphasis added), the rear deck, being at the rear of the house, was not a place, like a driveway, with ready access to visitors. Furthermore, being in the rear of the house, it was not an area generally visible to members of the public. I conclude that the doctrine of Payton applies

to an arrest made on the rear deck of the Karagozian home.

Id. at l 164 (citations omitted).[8]

The court noted that the "police can still question people in their homes. In the absence of exigent circumstances, what they cannot do without a warrant is arrest people in their homes, even if they have probable cause to arrest." Id. at 1165.

The court finds that the officers in the present case made a constructive entry into Ms. Hopper's house when Officer Cunningham called Defendant to the door and asked him to step outside so that the Alabama investigators could talk to him. The presence of(1) two officers at the back door and two other officers at the front door of the house, (2) Investigator Whitten in the yard close to Defendant' s truck, and (3) four patrol cars in the driveway would have led a reasonable person in Defendant's position to believe that he was not free to leave. Moreover, the officers considered Defendant to be under arrest as soon as he came to the door. Therefore, in order for the arrest to be valid, the Government must show some exception to the requirement of a warrant for an in-home arrest. See Payton, 445 U.S. at 590 ("Absent exigent circumstances, that threshold may not reasonably be crossed with out a warrant.") The burden is on the Government to

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[8] The fact that Officer Cunningham testified that he :had observed that the rear door was the usual entrance to Ms. Hopper's house does not change the outcome of the patent case. As in Karagozian, "being in the rear of the house, it was not an area generally visible to members of the public" and was not "readily accessible to visitors."

show that there was an exception. Wayne K. LaFave, § 11.2(b) *Search and Seizure* 38 (3d Ed.1996).

Exigent circumstances generally fall into four categories: (1) evidence is in immediate danger of destruction, Schmerber v. California, 384 U.S. 757, 761-77 (1966); (2) an immediate threat to the safety of the officers or the general public exists, Warden v. Hayden, 387 U.S. 294, 298-99 (1967); (3) officers are in hot pursuit of a suspect, Welsh v. Wisconsin, 466 U.S. 740, 753 (1984); or (4) the suspect may flee before the officer can obtain a warrant, Minnesota v. Olson, 495 U.S. 91, 100 (1990). The Government relies on the fourth category, noting that Defendant's truck was parked behind the house with the door left open indicating that Defendant intended to flee.

The court finds that exigent circumstances did not exist to excuse the officers' failure to obtain a warrant. The Alabama investigators discovered the attempted theft of the anhydrous ammonia at approximately 5:00 a.m. They did not arrive at Ms. Hopper's house until approximately 10:00 a.m. During the intervening five hours, the officers had time to obtain a warrant. Even if the open door to the truck indicated that Defendant intended to flee no evidence was presented that the Alabama investigators knew this and hurried to Ms. Hopper's house. Moreover, with several officers present at Ms. Hopper's house, there was no danger that Defendant would escape before a warrant could be secured.

Because the officers made an in-home warrantless arrest in the absence of any exigent circumstances to justify such an arrest, the court finds that the arrest was not lawful and that any items seized from Defendant's person as the result of the arrest must be suppressed.

Items Seized from Defendant's Vehicle

Defendant has also moved to suppress the items that were seized from his vehicle after his arrest. As discussed above, any items that were seized from Defendant's person as the result of the arrest must be suppressed. Likewise, any items seized from Defendant's truck as an inventory search or a search incident to an attest must be suppressed. The Government, however, points out that certain items that were seized were in plain view of the officers and argues that these items are admissible regardless of the court's holding concerning Defendant's arrest.

In Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971), the Supreme Court held that "under certain circumstances the police may seize evidence in plain view without a warrant...What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." To invoke the plain view doctrine, the evidence must be "(1) in plain view; (2) of a character that is immediately incriminating; (3) viewed by an officer lawfully located in a place from where the object can be seen; and (4) seized by an officer who has a lawful right of access to the object itself." United States v. Roark, 36 F.3d 14, 18 (6th Cir.1994) (citing Horton v. California, 496 U.S. 128 (1990)). See also Morgan, 743 F.2d at 1167.

The testimony at the hearing showed that Investigator Whitten observed a gun lying on the scat in the cab of the truck and two black plastic toolboxes and a silver canister "like Coke comes in" in the back of the truck. Officer Cunningham observed a blue cooler and "stainless steel Coke

thing" in the back of the truck. It is undisputed that these items were in plain view of the officers.

As to the incriminating nature of the items seen, the facts available to the officer must "'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime," Texas v. Brown, 460 U.S. 730, 742 (1953) (quoting Carroll v. United States, 267 U.S. 132 (1925)). That is, the officers must have probable cause to believe that the item is evidence either of a crime or contraband. Arizona v. Hicks, 480 U.S. 321, 326-27 (1987). Probable cause does not require certainty. Brown, 460 U.S. at 742. In reviewing probable cause determinations, the court must consider the totality of the circumstances--including the officers' training and experience as well as their knowledge of the situation at hand. See United States v. Szymkowiak, 727 F.2d 95, 97 (6th Cir.1984). See also U.S. v. Shields,172 F.3d 880 (Table) (10th Cir. 1999) ("Additionally, we note that Officer Khatib testified that the incriminating nature of the evidence was immediately apparent to him because of his prior experience with illegal drug activities, not because of defendant's detention and the results of the search at the raid."); U.S. v. Turner, 1995 WL 63156 (6th Cir.) ("The test to determine if Officer Woods' plain view of the white substance provided sufficient probable cause is whether the criminal nature of the seized object was immediately apparent in light of the officer's particular experience. Considering Officer Woods' training and experience, we believe it was immediately apparent to him that defendant possessed cocaine. An officer can justifiably rely upon his training and experience in asserting whether criminal activity is occurring," (citations omitted)); United States v. Buchner, 7 F.3d 1149, 1154 (5th Cir. 1993) (holding that a probable cause determination "must be viewed in light

of the observations, knowledge, and training of the law enforcement officers involved in the warrantless search.")

In the present case, the court has determined that the officers had probable cause to believe that a drug crime had been committed. The officers testified that they were aware that canisters such as that seen in Defendant's truck were used in methamphetamine manufacturing operations. Consequently, the court finds that the incriminating nature of the silver canister was immediate and apparent.

Likewise, the incriminating nature of the Thompson .367 firearm was immediate and apparent. As noted, the officers had probable cause to believe that Defendant had committed a drug crime. The gun was lying on the seat of the truck instead of being stored in a secure area and was in close proximity to evidence, i.e., the silver canister, of a drug crime. See United States v. Wolfe, 2000 WL 1562833 (6th Cir.) (Finding that the incriminating character of the firearms was immediately apparent because "the officers saw in plain view scores of firearms, including automatic weapons, a sawed-off rifle, several silencers and pen guns, and tools for making weapons fire automatically, in immediate proximity to the marijuana growing operation. The weapons were not in gun cases, but were mostly loaded and hung on peg board.") Therefore, both the silver canister and the Thompson .367 firearm meet the second requirement of the plain view exception. However, the two black plastic toolboxes and the blue cooler do not meet this requirement, even though they were in plain view of the officers, because there is nothing about them that is immediately and apparently indicative of criminal activity.

Investigator Whitten and Officer Cunningham testified that the firearm was plainly visible on the seat of the truck and the

silver canister was visible in the back of the truck. Thus, the items were "viewed by an officer lawfully located in a place from where the object can be seen."

Finally, the court must determine if the officers had "a lawful right of access to the object itself." Law enforcement officers may encroach upon the curtilage[9] of a home for the purpose of asking questions. United States v. Hopper, 2003 WL 152316 (6th Cir.) (citing United States v. Hammett, 236 F.3d 1054, 1059 (9th Cir. 2001)). The Fourth Amendment is not implicated when officers go to the back door reasonably believing that it is used as a principal entrance to the dwelling. United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990); United States v. Freeman, 426 F.2d 1351, 1352-53 (9th Cir.1970). Accordingly, the officers were lawfully in a position to see into the cab and the bed of Defendant's truck.

The silver canister and the Thompson .367 firearm meet the requirements of the plain view exception to the search warrant rule and, thus, they may be admitted as evidence at trial. Any other evidence seized from Defendant's truck must be suppressed.

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[9] The "curtilage" of a home is defined as the area outside the house which harbors the "intimate activity associated with the sanctity of a man's home and the privacies of his life." Oliver v. United States, 466 U.S. 170, 180-81 (1984). An area's status as protected curtilage depends on consideration of four factors: l) the proximity of the area claimed to be the curtilage to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and 4) the steps taken by the resident to protect the area from observation by people passing by. United States v. Dunn, 480 U.S. 294, 300 (1987).

Items Seized from Three-Sided Barn

Defendant asserts that any items seized from the three-sided barn must be suppressed because (1) the officers lacked probable cause to search the barn and (2) Mrs. Thomas' consent to search the barn was invalid. As to Defendant's first argument, the Government relies on the "open fields" doctrine.

The open fields doctrine, as enunciated in Hester v. United States, 265 U.S. 57 (1924), and reaffirmed in Oliver v. United States, 466 U.S. 170 (1984), holds that the Government's intrusion onto open fields without a search warrant "is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." Oliver, 466 U.S. at 177. The doctrine stems from the Supreme Court's observation that the Fourth Amendment refers only to "persons, houses, papers, and effects" (and not to fields) and the Court's belief that society is not prepared to recognize as reasonable an individual's subjective expectation of privacy in an open field. Id. at 176-80.

It is well-settled that observations of "objects falling into the plain view of an officer who has a right to be in the position to have that view ... may be introduced in evidence." Harris v. United States, 390 U.S. 234, 236 (1968). Applying this principle, the Supreme Court held in Dunn that officers who used a flashlight to look through a net-covered opening in the defendant's barn, revealing evidence of drug manufacturing within, did not conduct a "search" within the meaning of the Fourth Amendment. 480 U.S. at 305. The Court reached this conclusion even though the officers had to enter the defendant's property and cross several fences to reach the barn and even though the Court assumed that the interior of the barn was protected against warrantless entry

under the Fourth Amendment. Id. at 297-98, 303. The Court reasoned that, when the officers looked into the barn's interior, they stood in an area that fell under the "open fields" doctrine rather than in the protected curtilage about the defendant's home. Id. at 300-01. "[T]he fact that the objects observed by the officers lay within an area that we have assumed, but not decided, was protected by the Fourth Amendment" did not transform the scrutiny into a search. Id. at 304- 05.

The testimony established that the Sheriff's Department received a telephone call stating that children were in danger from a methamphetamine lab located on Cobblestone Road. Officers went to that location and discovered a barn. Clearly, this area was an open field. Even if a fence barred access to the driveway, it was still an open field. Fences, closed or locked gates, or "No Trespassing" signs on an otherwise open field have no constitutional import. Oliver, 466 U.S. at 181-82. See also United States v. Burton, 894 F.2d 188, 190 (6th Cir.), *cert. denied,* 498 U.S. 857 (1990). Accordingly, the officers did not need a search warrant to enter the Cobblestone Road property.

The officers testified that the methamphetamine lab inside the barn was visible from outside the barn. Thus, it was in plain view. The officers also testified that they recognized the items in the barn as a methamphetamine lab, i.e., the items were of a character that is immediately incriminating. The officers had a right to be where they were under the open fields doctrine. Therefore, the items in the barn are admissible.

Alternatively, the Government contends that Mrs. Thomas' consent to the search of the three-sided barn vitiated

the lack of a search warrant. Defendant counters that Mrs. Thomas' consent was coerced and, therefore, invalid.

The Fourth Amendment normally prohibits the warrantless search of an individual's property. United States v. Haddix, 239 F.3d 766, 767 (6th Cir. 2001). However, the prohibition does not apply to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). As explained in United States v. Riascos-Suarez, 73 F.3d 616 (6th Cir.1996):

> A search may be conducted without a warrant if a person with a privacy interest in the [place] to be searched gives free and voluntary consent. A court will determine whether consent is free and voluntary by examining the totality of the circumstances. It is the Government's burden, by a preponderance of the evidence, to show through "clear and positive testimony" that valid consent was obtained. Several factors should be examined to determine whether consent is valid, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands, his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.

Id. at 625 (citations omitted). Here, Mrs. Thomas, as an owner of the property, clearly had actual standing to consent.

Any statements made to Mrs. Thomas or her mother that Mrs. Thomas would not "get in trouble" if she signed the consent form did not constitute coercion. A defendant "must

show more than a subjective belief of coercion, but also some objectively improper action on the part of the police" in order to invalidate consent. United States v. Crowder, 62 F.3d 782, 787 (6th Cir. 1995). Such action was not present here.

The officers were under no obligation to read the form to Mrs. Thomas or to explain the contents to her, especially in light of the fact that she had a college degree. See United States v. Worley, 193 F.3d 380 (6th Cir.1999) (The court should examine the following factors: the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.)

The court finds that all items seized by the officers during the search of the three-sided barn are admissible because they were in plain view and because Defendant's wife gave her consent for the search.

Defendant's Motion to Reopen Proof in Suppression Hearing and Motion to Continue Trial

Defendant has moved the court to reopen the proof to allow him to supplement the evidence that was presented at the suppression hearing. Because there is sufficient evidence in the record to decide the issues before the court, Defendant's motion is DENIED.

Defendant has also moved to continue the trial of this matter. The trial was continued in an order entered on August 10, 2004. Therefore, Defendant's motion is DENIED as moot.

Summary and Conclusion

Defendant's motion to suppress is PARTIALLY GRANTED and PARTIALLY DENIED. The portion of the motion seeking to suppress items taken from Defendant's person is GRANTED. Any evidence obtained from Defendant's person on October 21, 2003, subsequent to his arrest may not be used by the Government in the prosecution of this matter. Additionally, the portion of the motion seeking to suppress items taken from Defendant's truck is GRANTED, other than the silver canister and the Thompson .357 firearm. The items that were seized from Defendant's truck on October 21, 2003, other than the silver canister and the Thompson .357 firearm, may not be used by the Government in the prosecution of this matter. The remaining portion of Defendant's motion to suppress is DENIED.

Defendant's motions to reopen the proof and to continue the trial are DENIED. IT IS SO ORDERED.

/s/
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

15 September 2004
DATE